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### Internal Displacement, the Guiding Principles on Internal Displacement, the Principles Normative Status, and the Need for Their Effective Domestic Implementation in Colombia

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## Internal Displacement, the Guiding Principles on Internal Displacement, the Principles Normative Status, and the Need for their Effective Domestic Implementation in Colombia

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Robert K. Goldman \*

*Resumen:* El artículo analiza el fenómeno del desplazamiento forzado alrededor del mundo, así como la génesis del mandato de las Naciones Unidas para luchar contra este problema. Examina las conclusiones clave del estudio de la ONU que encontró que las normas existentes del derecho internacional tienen varios vacíos y zonas grises relativos a las necesidades de los desplazados internos. También analiza los orígenes y el contenido de los principios guía del desplazamiento interno, así como el estatus normativo de los mismos. Así mismo, sugiere que, a pesar de no ser vinculante para los Estados, estos principios guía se convirtieron en la expresión más autorizada de los estándares mínimos aplicables a los desplazados internos como consecuencia de la práctica estatal, es decir, que la mayoría de estos principios se volverán costumbre internacional. El artículo también señala la necesidad de que haya una implementación efectiva en el derecho interno de estos principios guía; examina cómo las autoridades gubernamentales, la Corte Constitucional y la sociedad civil en Colombia, así como las entidades intergubernamentales, respondieron a la crisis del desplazamiento interno en el país. Observando

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el marco legal colombiano en desplazamiento interno, el artículo concluye que el Estado no ha tomado las medidas necesarias requeridas para prevenir futuros desplazamientos o para asegurar una protección y asistencia efectivas para resolver las necesidades de los desplazados internos.

*Palabras clave:* Desplazados internos, Principios, principios guía en desplazamiento interno.

*Abstract:* The paper briefly examines the phenomenon of internal displacement world-wide and the genesis of the United Nation's mandate to deal with this problem. It examines key conclusions of a UN sponsored study which found that existing international law contained significant gaps and grey areas in terms of meeting the needs of internally displaced persons. It also examines the origins and the content of the Guiding Principles on Internal Displacement and the normative status of these Principles. It suggests that, while not binding as such on states, the Guiding Principles have nonetheless become the most authoritative expression of minimum international standards applicable to the internally displaced and that based on state practice many, if not all, of these principles may eventually become part of customary international law. The paper also discusses the need for effective domestic implementation of the Guiding Principles, and examines how governmental authorities, the Constitutional Court and civil society organizations in Colombia, as well as inter-governmental bodies, have responded to the crisis of internal displacement in the country. While noting the adequacy of Colombia's legislative framework on internal displacement, the paper concludes that the State has not taken the measures required to prevent future displacement or to effectively meet the protection and assistance needs of its displaced citizens.

*Key words:* Internally displaced persons; guiding principles on internal displacement.

## Introduction

This paper briefly examines certain key issues related to forced internal displacement, the Guiding Principles on Internal Displacement and International Law. This writer was quite fortunate to have worked for several years very closely with Francis Deng, the former Special Representative of the Secretary-General on Internally Displaced Persons, and Professor

Walter Kalin, the current Special Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, in developing the normative framework applicable to internally displaced persons (IDPs). It is hoped, that this paper will provide useful insights into the origins, substantive content and normative character, as well as the impact of the Guiding Principles on Internal Displacement. The paper also addresses internal displacement in Colombia and the need for the state and other parties to the ongoing hostilities to implement the Guiding Principles in order to avoid future displacement and ensure that those currently displaced are effectively protected and assisted.

### **Origin of the UN Mandate on Internally Displaced Persons**

It was not until the early 1990s that international concern began to increasingly focus on the plight of IDPs, i.e., people forced from their homes as a result of armed conflict, communal violence, serious human rights and humanitarian law abuses and/or natural or man-made disasters and who remain uprooted and at risk within their own countries. Unlike persons who flee across international borders and may be entitled to the status and protective international legal regime applicable to refugees, IDPs remain within their country. As such, they remain subjected to the jurisdiction of their own government, whose very actions or policies may have caused their displacement and may be unwilling or unable to protect or assist them.

Although IDPs are theoretically entitled to enjoy the same human rights as the rest of the country's persons, experience amply indicates that they are rarely able to do so. Indeed, forced displacement frequently entails multiple human rights violations since it "breaks up the immediate family... cuts off important social and community ties; terminates stable employment relationships; precludes or forecloses formal educational opportunities; deprives infants, expectant mothers, and the sick of access to food, adequate shelter, or vital health services; and makes the displaced population especially vulnerable to acts of violence, such as attacks on camps, disappearances, or rape".<sup>1</sup>

In 1982, it was estimated that some 1.2 million were forcibly displaced in eleven countries; by 1995 an estimated 20 and 25 million IDPs were

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1 W. Kalin & R. Goldman, "Legal Framework" in R. Cohen & F. Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (Washington D.C.: Brookings Institution Press, 1998) pp. 74, 92 (hereinafter *Masses In Flight*).

located in some forty countries, approximately double the number of refugees worldwide.<sup>2</sup> By 2007, this figure escalated to approximately 26 million IDPs, with Colombia, Iraq and Sudan accounting for 50% of that figure.<sup>3</sup>

As Roberta Cohen, an expert on IDPs affiliated with the Brookings Institution has noted, relief agencies and non-governmental organizations (NGOs) working in the field recognized the magnitude of this humanitarian crisis and sought to help IDPs, but “they found that they had no clear rules for doing so. Indeed, the Office of the High Commissioner for Refugees (UNHCR), the United Nations Children’s Fund (UNICEF), and non-governmental organizations (NGOs) began to appeal for a document they could turn to that would define IDPs and their entitlements”.<sup>4</sup> James Grant, UNICEF’s former executive director, aptly stated: “The world has established a minimum safety net for refugees. Whenever people are forced into exile...refugees can expect UNHCR to be on the scene in a matter of days or on the outside, a matter of weeks. This is not yet the case with respect to internally displaced populations”.<sup>5</sup> It should be pointed out that the International Committee of the Red Cross (ICRC) is mandated by the Geneva Conventions of 1949 to assist victims of armed conflicts, including internally displaced populations, and has a right of initiative under its statutes to offer its services to governments in situations falling short of armed conflict. Although the ICRC has undertaken important activities on behalf of IDPs, it was generally felt that the sheer magnitude of internal displacement worldwide not only exceeded its capacity to act, but also required a more comprehensive and particularized response by the international community.

Within the UN system, large- scale internal displacement was largely seen as the precursor of massive refugee flows in volatile regions which could provoke serious political and security problems. In a similar vein, former Secretary-General Kofi Annan admonished that if not addressed, such

2 Ibid. at pp. 3, 32.

3 Internal Displaced Monitoring Center, *Internal Displacement: Global Overview and of Trends and Developments in 2007* (Geneva: Norwegian Refugee Council, Apr. 2008) available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/BD8316FAB5984142C125742E0033180B/\\$file/IDMC\\_Internal\\_Displacement\\_Global\\_Overview\\_2007.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/BD8316FAB5984142C125742E0033180B/$file/IDMC_Internal_Displacement_Global_Overview_2007.pdf) (last visited May. 5, 2008) at 7, 13.

4 R. Cohen, “The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting” in *Global Governance* 10 (2004) at p. 461.

5 J.P. Grant, “Refugees, Internally displaced and the Poor: An Evolving Ethos of Responsibility”, address at Round Table on the Papal Document, UNICEF, 9 March 1993.

displacement could “spill across borders and upset external and regional stability”. He also described the crisis of internal displacement as an “unprecedented challenge for the international community: to find ways to respond to what is essentially an internal crisis”. NGOs, while sensitive to issues of national sovereignty, became increasingly vocal in insisting that “when governments deny access to populations at risk and deliberately subject them to starvation and other abuses, the international community must find ways to provide the needed assistance”.<sup>6</sup>

As global awareness of the plight of the internally displaced gradually increased, “international discussions increasingly focused on ‘a right to humanitarian assistance’ and, as Roberta Cohen notes “UN agencies and NGOs became far more active in hard diplomatic bargaining to persuade both governments and rebel forces to allow food and supplies to reach displaced persons at risk. In the case of Iraq in 1991, the international community not only demanded access to hundreds of thousands of displaced Kurds but set up a security umbrella to protect them. Subsequent UN Security Council resolutions demanded access to internally displaced populations in other countries as well and at times authorized the use of force to facilitate the delivery of relief and to provide protection to them”.<sup>7</sup> NGOs, with the support of certain key states, began pressing for the creation of a mechanism within the UN system that would focus on IDPs and develop standards to protect them.

Responding to these pressures, in 1992 the UN Human Rights Commission passed a resolution calling on the Secretary-General to name a representative on internally displaced persons to monitor situations of internal displacement worldwide and to devise ways to better protect and assist them.<sup>8</sup> In particular, the resolution called on the representative to examine the applicability of international human rights and humanitarian law, as well as principles of refugee law, to the protection of IDPs.<sup>9</sup> Shortly thereafter, the Secretary-General appointed Dr. Francis M. Deng, a distinguished former Sudanese diplomat and legal scholar, to that position.

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6 R. Cohen, “Some Reflections on National and International Responsibility in Situations of Internal Disturbances” in *Forced Migration in South Asia: Displacement, Human Rights and Conflict Resolution* (Jadavpur University ed. by O. Mishra).

7 Ibid.

8 UN Commission on Human Rights Res. 1992/73 (5 March 1992).

9 Ibid.

From the Brookings Institution in Washington, D.C., Dr. Deng moved rapidly in assembling a team of legal scholars from Europe and the United States to assist him in preparing the requested study. I should note, parenthetically, that I had the good fortune to chair the legal team established under the joint auspices of the American Society of International Law and the International Human Rights Law Group (now Global Rights) to assist Dr. Deng. The members of the various legal teams working with the Special Representative met periodically in Washington and Europe from 1993 to 1995. Importantly, legal experts from the ICRC and UNHCR also participated in these meetings. The studies prepared by these teams were eventually merged into a single document titled *Compilation and Analysis of Legal Norms applicable to the Internally Displaced* that Dr. Deng presented to the UN Human Rights Commission in 1996, which was followed by a supplement in 1998.<sup>10</sup>

### Methodology and Key Conclusions of the Compilation and Analysis of Legal Norms

*The Compilation and Analysis of Legal Norms* adopted a “needs-based” rather than a “rights-based” approach. This required first identifying the basic needs of IDPs and then determining the extent to which international human rights law, international humanitarian law and refugee law, by analogy, meet those needs in three recognized situations in international law. These situations, which cover most cases of internal displacement, are: (1) situations of tension and disturbances, or disasters in which human rights law is applicable; (2) situations of non-international armed conflict governed by the central principles of international humanitarian law and by many human rights guarantees; and (3) situations of inter-State or international armed conflict in which the detailed provisions of humanitarian law become primarily operative and many fundamental human rights norms remain applicable.

The study concluded that while existing international law covers, albeit in a dispersed and diffuse manner, many aspects relevant to internally displaced persons there are many areas in which the law provides insufficient protection because of inexplicit articulation or normative gaps. Specifically, the study identified seventeen areas of insufficient protection and eight

<sup>10</sup> UN, *Compilation and Analysis of Legal Norms*, Report of the Representative of the Secretary-General on Internally Displaced Persons, UN Doc. E/CN.4/1996/52/Add. 2; Part II, *Legal Aspects Relating to Protection Against Arbitrary Displacement*, was completed in 1998 and appears in UN Doc. E/CN.4/1998/53/Add.1 (1998).

clear gaps in the law. Regarding inexplicit articulation, the study found that there are numerous areas where a general norm exists, but a corollary, more specific right relevant to the needs of the internally displaced has not been articulated. For example, although there is a general human rights norm guaranteeing freedom of movement, there is no explicit right to find refuge in a safe part of the country. Similarly, although a general norm prohibits cruel, inhuman or degrading treatment, there is no express norm prohibiting the forcible return of IDPs to dangerous areas within their own country. Another example can be found in the area of non-discrimination, where treaties prohibit discrimination, *inter alia*, on the basis of any “other status” of the person concerned. Although this can be interpreted to include the status of being internally displaced, no authoritative body has yet rendered such a decision. Moreover, although human rights treaties prohibit arbitrary detention, the preconditions for lawful detention of IDPs in closed camps are unclear. In addition, although there may be a general norm covering essential medical care, the special needs of displaced women in the areas of reproductive and psychological health care have not yet been clearly articulated.

The study found numerous instances where the law is silent. For example, no international instrument contains an express right not to be arbitrarily displaced. The study also identified legal gaps in the protection of IDPs, such as the absence of a right to restitution of property lost (or compensation for its loss) as a consequence of displacement during armed conflict situations, a right to have access to protection and assistance during displacement, and a right to personal documentation. In these cases, the study indicated that such rights would have to be inferred from other provisions of law.

Further gaps occur where a legal norm is not applicable in all circumstances. For example, since human rights law is generally binding only on state agents, IDPs lack sufficient protection in situations of internal tensions and disturbances where violations are perpetrated by non-state actors. Another instance of insufficient protection occurs in situations falling below the threshold of application of international humanitarian law, in which restriction or even derogation of human rights guarantees might be permissible. Finally, there are “ratification” gaps which are still numerous. Such gaps can result in a vacuum as regards legal protection for the IDPs in those states that have not ratified key human rights treaties and/or the Additional Protocols to the 1949 Geneva Conventions.

Without stipulating the nature of a future international instrument applicable to IDPs, the *Compilation and Analysis of Legal Norms* did suggest the



need to both, restate general principles of protection in more specific detail and address the grey areas and gaps identified in the study. In this regard, Dr. Deng and his legal team felt that restating and clarifying legal norms in a single coherent document could reinforce and strengthen existing protection.

Early on, it was deemed wise not to pursue the treaty route, but instead to elaborate a comprehensive set of guiding principles. There were three principal reasons for this decision. First, there was little support by states for a new binding instrument, largely because of the sensitivity over issues of national sovereignty. Second, treaty making is notoriously slow and there was an immediate and pressing need to comprehensively address the plight of IDP. Third, the *Compilation and Analysis* confirmed that despite identified gaps and grey areas, a good deal of international law applicable to IDPs already existed. “What was required was to bring together the myriad of provisions now dispersed in a large number of instruments and to tailor them to the specific needs of the internally displaced”.<sup>11</sup>

Armed with a mandate from the UN Human Rights Commission and the General Assembly to develop an “appropriate” framework based on the *Compilation and Analysis*, Dr. Deng and his legal team began drafting the Guiding Principles on Internal Displacement over a two-year period.<sup>12</sup> This exercise involved broad consultations with representatives of international organizations, specialized agencies and institutions, such as the ICRC and UNHCR, regional bodies from Africa, the Americas and Europe, international legal experts, and NGOs from all regions of the world. The Guiding Principles, which were finalized at an expert consultation in Vienna in January 1998, were submitted by the Representative of the Secretary-General to the UN Human Rights Commission several months later.

## The Guiding Principles on Internal Displacement

The Guiding Principles on Internal Displacement consist of 30 principles which are comprehensive in scope and apply to all phases of displacement. As such, they identify key rights and guarantees relevant to protecting persons against forced displacement, and assisting them during displacement and during their return or resettlement and reintegration.

<sup>11</sup> R. Cohen, *supra* note 4, at p. 465.

<sup>12</sup> See UN Commission on Human Rights Res. 1996/52 (19 April 1996).

A key precept underlying the Guiding Principles is the concept of national sovereignty as a form of responsibility, which Dr. Deng espoused and raised in his dialogues with governments. This concept essentially "... stipulates that states, as a measure of their sovereignty, have the fundamental responsibility to provide life-supporting protection and assistance for their citizens. If they are unable to do so, they are expected to request and accept outside offers of aid. However, if they refuse or deliberately obstruct access and put large numbers at risk, the international community has a right and even a responsibility to assert its concern. ... Deng repeatedly has pointed out that no state claiming legitimacy can quarrel with its commitment to protect all of its citizens. Sovereignty must mean accountability to one's population and also to the international community in the form of compliance with international human rights and humanitarian agreement".<sup>13</sup> In this connection, Roberta Cohen indicates that "it is worth noting that no government has ever explicitly challenged the concept of sovereignty as responsibility, no doubt because any government that did so would have to argue that sovereignty would allow a state to deny life-sustaining support to its citizens".<sup>14</sup>

Accordingly, the Guiding Principles provide that national authorities, consistent with their duty to respect international human rights and humanitarian law, are obliged to "prevent and avoid conditions that might lead to displacement" (Principle 5) and where it occurs, "have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction" (Principle 3) and to "establish the conditions for ending displacement through voluntary return or resettlement" (Principle 28).

The Guiding Principles describe, but do not define, who is an IDP. For the purposes of these principles, internally displaced persons are:

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or man-made disasters, and who have not crossed an internationally recognized State border.<sup>15</sup>

13 R. Cohen, *supra* note 6, at p. 2.

14 R. Cohen, *supra* note 4, at p. 466.

15 Introduction to Guiding Principles at para. 2.

As Professor Walter Kalin, the current Special Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, writes “this description of an internally displaced person highlights two elements: (1) the coercive or otherwise involuntary character of movement, and (2) the fact that such movement takes place within national borders”.<sup>16</sup> Therefore, the Guiding Principles do not apply to migrants who voluntarily leave their homes for economic, social or cultural reasons. They do, however, apply to persons uprooted by natural or man-made disasters and development projects. Such persons not only may require life-sustaining aid, but frequently are discriminated against by national authorities on political, cultural or ethnic grounds or suffer other human rights abuses. It is important to note that the list of reasons for displacement in the Guiding Principles “is not exhaustive as indicated by the use of the words ‘in particular’.”<sup>17</sup>

As stated in the document itself, the Guiding Principles reflect and are consistent with international human rights and humanitarian law. Indeed, many of the principles, particularly those relating to protection during displacement in Section III (Principles 10-23), are essentially declaratory of customary law. The principles in this Section first restate applicable human rights law and then specify their relevance for IDPs by spelling out what these guarantees mean in the context of displacement. Many of these principles blend basic international humanitarian law rules and principles with key human rights guarantees, thereby underscoring the shared purpose of both bodies of law to safeguard human life and dignity. Others have either been modeled on or are near verbatim transcriptions of provisions in international humanitarian law treaties and apply to situations of conflict-induced displacement. For example, Principle 6 expressly recognizes a right not to be arbitrarily displaced. This right is inferred from various human rights guarantees, including freedom of movement and residence, and international humanitarian law provisions dealing with the forced displacement of civilians during armed conflict. Paragraph 2 of Principle 6 sets forth categories of prohibited displacement, including displacement occasioned by armed conflict. By stating that such would be arbitrary during armed conflicts unless the security of the civilians involved or imperative military

16 W. Kalin, *Origin, Content and Legal Character of the Guiding Principles on Internal Displacement* in *The Guiding Principles on Internal Displacement and The Law of The South Caucasus, Georgia, Armenia, Azerbaijan* (American Society of International Law 2003 eds. R. Cohen & W. Kalin) at p. xv, xxv.

17 Ibid.

reasons so demanded, this principle reflects several provisions of the Fourth (Civilian) Geneva Convention and the Additional Protocols to the Geneva Conventions.<sup>18</sup> However, other basic guarantees, such as Principle 12 (3) on protection of IDPs from discriminatory arrest and detention resulting from their displacement, Principle 18 on the right to an adequate standard of living, Principle 21 on the protection of property, and Principle 23 on the right to education, also apply to those displaced by situations not entailing armed conflict, such as development projects or disasters.

Section IV of the Guiding Principles deals with the important issue of humanitarian assistance. As previously noted, Principle 25 reaffirms the primary duty and responsibility of national authorities to provide humanitarian assistance to their displaced population. This principle also provides that international humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced and that such an offer shall not be regarded as an unfriendly act or as interference in a state's internal affairs. Consistent with the principle of national sovereignty, this Principle implicitly recognizes that no such external assistance can be undertaken without the consent of the state concerned. However, in accordance with the concept of sovereignty as responsibility and with provisions found in humanitarian law instruments, such consent cannot be withheld for arbitrary reasons, especially if the state is unable or unwilling to provide the required assistance. As Professor Kalin notes, national authorities "...can hardly keep out all organizations providing such assistance for prolonged periods of time without falling into arbitrariness".<sup>19</sup>

The last section of the principles deals with the post-displacement phase, addressing return, resettlement and reintegration. These principles were largely inspired by and reflect certain basic tenets of refugee law. However, it should be recalled that since IDPs, unlike refugees, remain in national territory; they should retain and be entitled to exercise the full rights of citizenship. Although refugee law provided useful guidance to the drafters, that body of law is not directly applicable to IDPs who "should not be treated like refugees whose treatment is very often assimilated to the lower standards

18 See, e.g., ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (M.Nijhoff 1987), at pp.1472-73.

19 W. Kalin, *supra* note 16, at p. xvii.

applicable to aliens legally present in the country of refuge<sup>20</sup> and who need the substitute international protection afforded by refugee conventions.

Principle 28 (1) stipulates the primary duty and responsibility of competent authorities to establish conditions and to provide the means by which IDPs may return *voluntarily*, in safety and with dignity, to their homes or habitual places of residence or to resettle *voluntarily* in another part of the country. While not tantamount to an individual right to return to one's home, this principle does set forth appropriate solutions to problems associated with post-displacement. Principle 28 (2) provides that special efforts should be made to ensure the full participation of IDPs in the planning and management of their return, resettlement or reintegration. It also provides that, if resettled in another part of the country, such IDPs should not be discriminated against and shall have the right to fully and equally participate in public affairs and have equal access to public services. Finally, Principle 29 (2) indicates that returned or resettled IDPs should be able to recover, to the extent possible, their property or possessions and, when not possible, to obtain appropriate compensation or other form of just reparation.

It is important to note that the Guiding Principles do not alter, replace or modify existing international law or rights granted to individuals under domestic law. Rather, they are designed in large measure to provide guidance on how the law should be interpreted and applied during all phases of displacement. By calling on "all authorities and international actors" to respect their obligations under international law, including human rights and humanitarian law, the Guiding Principles also seek to prevent and avoid conditions that might lead to displacement in the future.

### The Legal Character of the Guiding Principles

The Guiding Principles, as elaborated, are not a legally binding document. As the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons has pointed out, unlike, treaties, declarations, resolutions or recommendations, "they have not been negotiated by States but prepared by a team of experts in close consultation with the concerned agencies and organizations and then submitted to the Human Rights Commission. Thus, they do not even constitute typical soft law, i.e., they do not belong to those recommendations that rest on the consensus of states and

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20 Ibid. at p. xviii.

thereby assume some authority that may be even taken into account in legal proceedings, but whose breach does not constitute a violation of international law in the strict sense, and thus does not entail State responsibility. Their soft law character stems not from the process of elaboration but from their content which is solidly grounded in existing international law”.<sup>21</sup>

As stated many of the principles, especially those relating to the displacement phase, were deduced from more general human rights norms or principles that are already part of customary international law. This is amply documented in the *Compilation and Analysis*, as well the *Annotations* to the Guiding Principles prepared by Professor Kalin.<sup>22</sup> Furthermore, the recently published study on customary international humanitarian law prepared by the ICRC bears out that the Guiding Principles, as applied to situations of armed conflict, restate in large measure customary international law.<sup>23</sup>

To the extent that UN bodies, regional inter-governmental organizations and states, invoke and reiterate the applicability of the Guiding Principles, the normative character of these principles will undergo change and over time many, if not all, *may* become part of customary international law. And, I would submit, that this process is well under way. For example, although the UN Commission on Human Rights and the General Assembly initially only “took note” of the Guiding Principles and Dr. Deng’s then stated intention to use them in his work, subsequent resolutions contained much stronger language, suggesting an endorsement of the document. In 2003, the UN Commission on Human Rights expressed “appreciation” for the principles, called them a “standard”, welcomed their “dissemination, promotion and application” worldwide, and welcomed the fact that “an increasing number of States, United Nations agencies and regional and non-governmental organizations [were] applying them”.<sup>24</sup>

For his part, former Secretary-General Annan strongly supported the Guiding Principles, calling them a “notable achievement” in the humanitarian area and in a report to the Security Council in 1999 requested that body to call on states to observe the principles in situations of mass displacement.

21 W. Kalin, The Guiding Principles as International Minimum Standard and Protection Tool, *Refugee Survey Quarterly* (2005), 24: 27-36.

22 W. Kalin, *Guiding Principles on Internal Displacement, Annotations* (American Soc. of International Law 2002).

23 J.M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: Rules, (ICRC/Cambridge Un. Press, 2005).

24 UN Commission on Human Rights, Res. 2003/51 (23 April 2003).

He also recommended that the General Assembly and ECOSOC encourage states to develop national policies and laws “consistent with” the Guiding Principles.<sup>25</sup> In March 2005, the former Secretary-General in his report on UN reform, *In Larger Freedom*, urged states to accept the Guiding Principles as “the basic international norm of protection”. Based on this report, the Chairman of the UN General Assembly circulated a draft Declaration for adoption by the Heads of State and Government in September of that year which contains language that recognizes the Guiding Principles as “the minimum international standard for the protection of internally displaced persons”. Furthermore, the Security Council has begun citing the principles in its resolutions and presidential statements.

Comparable support for the principles is found at the regional level. For example, the Parliamentary Assembly of the Council of Europe has urged member states to incorporate the Guiding Principles into their domestic law, and the Organization for Cooperation and Security in Europe has recognized the Principles as a “useful tool” in fashioning national policies on internal displacement.<sup>26</sup> The African Union has formally acknowledged the Principles, and the Economic Community of West African States called on its members to disseminate and apply them. In addition, the Intergovernmental Authority on Development in the Horn of Africa called the Principles in a ministerial declaration a “useful tool” in the development of national policies on internal displacement. Within the Organization of American States, the Inter-American Commission on Human Rights, the principal organ in the Americas for promoting and protecting human rights, endorsed the Guiding Principles in 1998. That same year, the Inter-American Commission became the first regional human rights body to create a Special Rapporteur on Internally Displaced Persons—a position which this writer held until 2004. The Inter-American Commission has used the principles as a benchmark in monitoring states’ responses to internal displacement in both Colombia and Peru. Moreover, since the late 1990s, both the Inter-American Commission and the Inter-American Court of Human Rights have issued numerous binding orders requiring the government of Colombia to pro-

25 UN, Report of the Secretary-General to the Security Council, *Protection of Civilians in Armed Conflict*, UN Doc. S/1999/957, recommendation 7; UN, Report of the Secretary-General to the Economic and Social Council, *Strengthening the Coordination of Emergency Humanitarian Assistance*, UN Doc. E/2003/85 (2003).

26 See R. Cohen, *supra*, note 4, at pp. 469-70.

tect thousands of displaced persons who are at risk in connection with the ongoing internal armed conflict in that country.

On the national level, the Guiding Principles have begun to have a practical impact. A small but increasing number of governments have developed policies based on the Principles and incorporated their provisions into national law.<sup>27</sup> For example, the Colombian government has an inter-ministerial body which looks to the Principles in its work on behalf of IDPs. In addition, Burundi, the Philippines, Sri Lanka, and Uganda, have also developed national policies based on the Principles.<sup>28</sup> In 2004, Peru's congress passed legislation based on the Guiding Principles that provides benefits for the displaced. The government of Angola has incorporated the Principles in a law pertaining to the resettlement of persons displaced by the civil war, and in Afghanistan, the Principles are informing the provisions of a decree relating to the safe return of IDPs. The government of Georgia has announced at the UN that it would bring its internal law into line with the Principles. Moreover, several non-state actors involved in civil strife have used the Principles. Specifically, the former Sudan People's Liberation Movement and Army used the principles in devising its policy on IDPs, and in Sri Lanka, the Liberation Tigers of Tamil Eelam have received some training based on them.<sup>29</sup> Most recently, the German government asserted in an official publication the following concerning the Guiding Principle's normative status: "Although originally not conceived as a binding instrument under international law, meanwhile they can be regarded as customary international law".<sup>30</sup>

The response of humanitarian agencies and NGOs to the Principles has been particularly noteworthy. For example, the Inter-Agency Standing Committee, composed of all the heads of the key international humanitarian and development organizations, welcomed the Principles and has had their staffs apply them in their work with IDPs. The Office for the Coordination of Humanitarian Affairs published 10,000 copies of the principles and distributed them throughout the world. Furthermore, the UNHCR developed various programs based on the principles in Sri Lanka and other countries.

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27 Ibid, at p. 470.

28 Ibid. at p. 470.

29 Ibid. at p. 471.

30 See Eight Report to the Federal Government on its Human Rights Policy in the Foreign Relations and Other policy Areas, Reporting Period 1 March 2005-29 February 2008 at p. 27.



Global and local NGOs, working with lawyers, academics, women's associations and others, have played an important role in promoting and seeking meaningful implementation of the Principles. They have "disseminated the principles, translated them into local languages, organized training sessions, and developed Power Point presentations, comic strips, and handbooks to make them relevant to local conditions".<sup>31</sup> To date, the Guiding Principles have been translated into 35 languages, and notably in India, they are now available in such local dialects as Assamese, Gujarati, Bodo, Karbi, and Meitei. Moreover, according to reports received from the field, displaced communities and IDP associations have found themselves "empowered" by the Principles. In Sierra Leone after learning of their rights, IDPs reportedly used the Principles to call on UN agencies to provide education in camps.<sup>32</sup>

The foregoing review indicates that there is ample evidence suggesting that international and regional organizations and an increasing number of states have gradually come to accept the authoritative character of the Guiding Principles. It is submitted that these principles, which are largely based on hard law, are today not only an indispensable and practical tool, but also the minimum international standard for protecting the rights of IDPs and providing guidance to governments, international agencies, regional organizations and NGOs in their dealing with them. Accordingly, the Guiding Principles, from a normative standpoint, have succeeded in filling a major gap in the international protection system for persons involuntarily uprooted from their homes.

### **The Need for Effective Domestic Implementation of the Guiding Principles**

The Guiding Principles do not have any monitoring or enforcement mechanisms which can be invoked by IDPs in need of protection and assistance. Moreover, acceptance of the Principles by states does not necessarily guarantee their effective implementation. In this regard, Professor Kalin notes that many governments faced with internal displacement, even when disposed to act, "lack the necessary capabilities and tools including laws, policies and institutions to do so".<sup>33</sup> He pointed out in his first report that

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31 See R. Cohen, *supra* note 4, at p. 471.

32 *Ibid.*

33 W. Kalin, *supra* note 22, at p. 5.

while attempts to incorporate the Guiding Principles into domestic law and policies and into regional international law are encouraging, some resulting laws and policies have not always succeeded in clarifying “how the rather abstract general principles of international law articulated by the Guiding Principles should translate into concrete action on the ground”.<sup>34</sup> For this reason, he announced his intention “to assist governments by developing, in broad consultation with relevant actors, a manual which would provide law and policy makers with detailed guidance as to the content, institutional arrangements and procedures necessary to make the Principles operational at the domestic level”.<sup>35</sup> This approach is consistent with the former Secretary-General’s exhortation to UN member states that they commit themselves to incorporate the Guiding Principles into their domestic law.

### Internal Displacement in Colombia

More than 4 million persons have been displaced in Colombia between 1985 and 2007,<sup>36</sup> with over 320,000 newly displaced people in the past year.<sup>37</sup> Professor Kalin’s 2007 report, issued after his mission to Colombia as the Special Representative on the Human Rights of Internally Displaced Persons, described this situation as one of the most serious in the world.<sup>38</sup>

The Inter-American Commission on Human Rights for nearly a decade has been reporting on the displacement situation in Colombia and its link to the illicit practices of the various parties to the country’s protracted civil strife. In a 1999 Report on Colombia, the Commission stated that “the phenomenon of internal displacement has reached such proportions in Colombia in recent years that the Inter-American Commission of Human Rights considers it to be one of the gravest aspects of the overall human

34 E/CN.4/2005/84.

35 W. Kalin, *supra* note 22, at p. 10.

36 Internal Displacement Monitoring Center, Almost 4 million Colombians displaced by violence between 1985 and 2007 available at [http://www.internal-displacement.org/idmc/website/countries.nsf/\(http+Envelopes\)/CC05B30C4C94EC96802570B8005A7090?OpenDocument](http://www.internal-displacement.org/idmc/website/countries.nsf/(http+Envelopes)/CC05B30C4C94EC96802570B8005A7090?OpenDocument) (last visited May 6, 2008).

37 Internal Displaced Monitoring Center, *supra* note 3, at p. 44.

38 U.N.G.A. Implementation of General Assembly Resolution 60/251 of March 15 2006 entitled “Human Rights Council” Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, Mission to Colombia, A/HRC/4/38/Add.3, Jan. 24, 2007 at par. 9.

rights situation”.<sup>39</sup> Describing the sheer magnitude of internal displacement as nothing less than “a humanitarian catastrophe,” the Commission’s report examined the causes of internal displacement, the then situation of IDPs in various parts of the country and the State’s responses to the crisis. The report emphasized Colombia’s primary duty “to provide protection and humanitarian assistance to internally displaced persons within its jurisdiction”.<sup>40</sup> It also recommended that the government seek assistance from the international community in carrying out the necessary humanitarian tasks if the magnitude of the problem is such that it exceeds the State’s budgetary possibilities or capacity to furnish assistance.<sup>41</sup> The Commission similarly emphasized the importance of the Colombian government’s cooperating with international organizations and agencies, such as the United Nations High Commissioner for Human Rights and the UNHCR, which established offices in Colombia in 1997 and 1998, respectively. For its part, the UN High Commissioner’s Office has highlighted the issue of internal displacement in Colombia in each of its Annual Reports. The Office’s latest report specified that “[c]ases of forced displacement (a crime under Colombian law, which has driven almost 2 million Colombians off their land) have not been properly investigated, and very few perpetrators have been convicted and reparation has been granted in very few cases”.<sup>42</sup>

Colombia has, at least on the books, an adequate legal framework for dealing with the phenomenon of internal displacement. Most particularly, Law 387 of 1997 includes measures to prevent forced displacement and to provide assistance and protection to IDPs during the voluntary return or resettlement process. Article 1 of Law 387 defines an IDP as:

... any person who has been forced to migrate within the national territory, abandoning his place of residence or customary economic activities, because his life, physical integrity, personal freedom or safety have been violated or are directly threatened as a result of any of the following situations: internal armed conflict, civil tension and disturban-

39 IACHR, Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102 Doc. 9 rev. 1, Feb. 26, 1999, par. 1.

40 Ibid. at para. 92.

41 Ibid. at para. 97.

42 Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia, A/HRC/7/39, Feb. 29, 2008, par. 54.

ces, general violence, massive Human Rights violations, infringement of International Humanitarian Law, or other circumstances arising from the foregoing situations that drastically disturb or could drastically disturb the public order.

Furthermore, article 32, as amended by Law 962 of 2005, states that those Colombians who find themselves displaced in accordance with article 1 and

... who have reported those acts to the Office of the Attorney General of the Nation, or before the Office of the Ombudsman, or before the District or Municipal Office of Human Rights, in the unique format designed by the Social Solidarity Network, shall have the right to receive the benefits established in this law. Any of those organizations that receive the mentioned statement shall submit a copy of the same, not later than the following working day, to the Social Solidarity Network or to the office that it designates at the municipal, district, or departmental level, for registration in the benefits program.

In addition, Law 387 created the National System for Comprehensive Assistance to Populations Displaced by Violence, integrated by the National Council for Comprehensive Assistance to Populations Displaced by Violence, which is charged with executing its mandate through a National Plan for Comprehensive Assistance. In 2000, the government enacted Decree 2569, which regulates Law 387 and creates the Single Registry for Displaced Persons (RUPD, for its Spanish acronym). The RUPD is a technical tool for registering displaced persons after they have declared their condition as such before the authorities designated in article 32 of Law 387. If an IDP makes the declaration within a year from the events that led to his or her displacement, that person will qualify for emergency humanitarian assistance.<sup>43</sup> If not registered during this time frame, the IDP would only have access, depending on the availability of funds, to State programs that provide assistance for return, reestablishment or relocation. The Decree explains in further detail the registration mechanism and the measures to be taken in order to assist IDPs.

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43 See Articles 8, 16 and 17 of Decree 2569 of 2000.

Although Professor Kalin recognized that this policy framework demonstrated “the commitment of the Government to address the challenge of this huge displacement crisis”,<sup>44</sup> he nonetheless was concerned “by the clear gap between the policies decided in the capital Bogotá and their often ineffective implementation at the departmental and municipal levels. The actual implementation of national policies seemed to depend too much on efforts the individual civil servants are willing to undertake in order to make the system work”.<sup>45</sup>

The humanitarian crisis of IDPs in Colombia arguably reached its apex in 2004. That year, Colombia’s Constitutional Court issued a landmark ruling in response to numerous complaints lodged on behalf of IDPs.<sup>46</sup> In “tutela” number T-025-2004, the Court concluded that “the treatment of the IDP population was such a deviation from constitutionally established requirements that the whole policy must be deemed an “unconstitutional state of affairs””.<sup>47</sup> The Court described the situation in the following terms:

...[o]wing to the circumstances that surround internal displacement, the persons... who are obliged ‘suddenly to abandon their place of residence and their usual economic activities, being forced to migrate to another place within national territory’ to escape from the violence caused by the internal armed conflict and the systematic disregard for human rights or international humanitarian law, are exposed to a much higher level of vulnerability, which entails a grave, massive and systematic violation of their fundamental rights and, thus, merits that the authorities should grant them special care and attention. Those displaced due the violence

44 U.N.G.A., Report of the Representative of the Secretary-General on the human rights of internally displaced persons, *supra* note 38, at par. 21.

45 *Ibid.* at 27.

46 The 108 “tutelas” were presented by 1150 families composed of approximately 4 persons. Mainly women as head of households, elderly persons, minors and indigenous, built up most of the aforementioned families. Constitutional Court, Ruling T-025 of 2004, Jan. 22, 2004, M.P. Manuel José Cepeda Espinosa.

47 Constitutional Court, Ruling T-025 of 2004, *supra* note 45 in Springer, Natalia. Colombia: Internal Displacement-Policies and Problems, (UNHCR, June 2006) available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?docid=44bf463a4> (last visited Aug. 17, 2008) at 30.

are in a state of vulnerability that makes them deserve special treatment by the State.<sup>48</sup>

Furthermore, the Court concluded that the IDP population in general had been subjected to violations of their rights to life, humane treatment, equal protection, of petition, and rights to work, health, social security, education, a minimum means of subsistence and the protection due to the elderly, women head of households, and children. The Court accordingly ordered the State to provide adequate resources to satisfy the necessities of the displaced population and to protect their basic human rights.<sup>49</sup>

In its ruling, the Court also instructed the National Council for Comprehensive Assistance to Populations Displaced by Violence to: (1) identify ways to overcome the insufficient availability of resources and the flaws of the institutional responses to the needs of IDPs; (2) secure the allocation of the resources to respond to these needs; (3) protect the fundamental rights of IDPs; (4) guarantee the inclusion of the organizations representing the IDPs in all the decision-making processes in order to overcome the “unconstitutional state of affairs”; (5) and treat IDPs with dignity, ensuring the dissemination of information detailing their rights in an immediate, clear and precise manner so that they are not forced to resort to legal remedies to secure the benefits to which they are entitled by law.<sup>50</sup>

The Court established a time frame in which its orders had to be fulfilled by state agencies. However, by 2006 the Court indicated that “the unconstitutional state of affairs has still not been overcome and that the rights of the displaced population have not been repaired”.<sup>51</sup> Consequently, the Court has maintained jurisdiction over the matter and, *inter alia*, has issued 43 resolutions monitoring the government’s compliance with its orders.<sup>52</sup>

48 Constitutional Court, Ruling T-025 of 2004, *supra* note 45, in *Ituango Massacres v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, 211 (July, 1, 2006).

49 *Ibid.*

50 *Ibid.*

51 See, Monitoring Commission of the Public Policy on Forced Displacement, First Report of the National Verification Presented to the Constitutional Court (Bogotá: Consultancy for Human Rights and Displacement (CODHES), Jan. 31, 2008) available in Spanish at [http://www.codhes.org/index.php?option=com\\_content&task=view&id=39&Itemid=52](http://www.codhes.org/index.php?option=com_content&task=view&id=39&Itemid=52) in English CD distributed by CODHES at p. 26, citing the Colombia Constitutional Court, Ruling Auto 218 of 2006.

52 *Ibid.*

Civil society organizations have also played an important role in this monitoring process. For example, in January 2008 the Monitoring Commission of the Public Policy on Forced Displacement, a national group composed of civil society organizations, presented its first report on the rights of the IDPs. The report was based on a National Survey of Verification of effective enjoyment of the rights of those IDPs registered with the RUPD. It is important to note that in its conclusions, the Monitoring Commission emphasized that “recent studies have shown that the proportion of the displaced population not included in the official registry is significant and could even surpass 50% of the total. Thus, though the survey’s results should be interpreted as ‘representative’ of the situation of IDP population, they cannot be seen as indicators of the living conditions of all IDPs”.<sup>53</sup> In this regard, in 2007 Refugee International affirmed quite pointedly:

[t]he implementation of the single registry, which determines eligibility for state provided services, is still faulty, leading to as many as 40 percent of genuine displaced being unregistered. Even when registered, access to basic services like education and health, decent housing and reliable job opportunities remains problematic. This is particularly true in areas where local authorities are less committed to helping the displaced and show unwelcoming attitudes and rejection.<sup>54</sup>

Moreover, Professor Kalin in his 2007 report indicated that the RUPD should remain “a tool to identify those who will be eligible for receiving assistance and certain other benefits, but not as an instrument used to define a specific legal status for the displaced. Therefore, it should not serve as a precondition for conferring IDP status”.<sup>55</sup> The Special Representative identified key shortcomings in the registration system. For example, Law 387’s categories of persons who can register as IDPs is narrower than the description contained in the Guiding Principles which includes, persons whose displacement results from natural disasters or development projects. Furthermore, his report stated that:

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53 Ibid. at 144.

54 Andrea Lari, *Striving for Better Days: Improving the Lives of Internally Displaced Persons in Colombia* (Washington D.C.: Refugees International, Dec. 2007) available at <http://www.refugeesinternational.org/content/publication/detail/10317/> (last visited May 6, 2008) at 1.

55 U.N.G.A., Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, *supra* note 38, at par. 30.

the Representative heard on several occasions that the measures for the prevention of displacement and the recognition of IDPs only referred to 'illegal armed groups,' but neither to the armed forces nor to the violence caused by the absence of the rule of law in areas where crime syndicates or reconstituted paramilitary groups operate. The Representative heard many testimonies of peasants who left after having been coerced to cooperate with either the armed forces or the armed groups, or both, and did not want to continue being subjected to further pressures and threats, but were unable to register.<sup>56</sup>

Professor Kalin also referenced problems associated with the government's registration process. Many IDPs complained about the difficulty of registering with the national authorities as they were "confronted with unpredictable office hours, difficulties in transport, impolite or indifferent civil servants or who had their applications rejected allegedly because they had been submitted too late, despite evidence of their having been forcibly displaced".<sup>57</sup>

On a related issue, the Inter-American Commission in its 1999 Report urged Colombia to "provide means for creating lasting solutions, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes, or to resettle in another part of the country".<sup>58</sup> In this connection, article 16 of Law 387 refers to the issue of return stating that "[t]he National Government shall support displaced populations that want to return to their places of origin, pursuant to the provisions contained in this law on the subjects of socioeconomic stabilization, consolidation, and protection". Professor Kalin's 2007 Report noted that while present conditions do not permit mass returns, a limited number of IDPs have returned to their places of origin. Nevertheless, these returnees indicated that they have received little or no assistance from the government, especially for the reconstruction of their dwellings. They have also affirmed that the areas to which they have returned remain largely very insecure.<sup>59</sup>

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<sup>56</sup> Ibid. at 31.

<sup>57</sup> Ibid. at par. 32.

<sup>58</sup> IACHR, Third Report on the Human Rights Situation in Colombia, *supra* note 39, at par. 97.

<sup>59</sup> U.N.G.A., Report of the Representative of the Secretary-General on the human rights of internally displaced persons, *supra* note 38, at par. 52.



Land and property are central issues to the return or resettlement of IDPs. In this regard, Professor Kalin has recognized “that some of the underlying causes of displacement and indeed many of the obstacles for durable solutions are linked to questions of land ownership and property entitlements that have not been properly solved over decades”.<sup>60</sup> Refugee International has noted that the success of any policy aimed at the solution of displacement in Colombia depends on the attention that is paid and solution that is given to land possession.<sup>61</sup> The Special Representative stated, with respect to the Afro-Colombian communities, that he was “disturbed by the fact that it would seem that their lands are being increasingly encroached upon by the various armed groups or the military, as was the case in Curbaradó or in San José del Guaviare, sometimes to the benefit of private economic interests. He felt that few protective measures were being enforced to prevent this”.<sup>62</sup>

These kinds of encroachments by the various parties to the ongoing internal armed conflict have been all too commonplace and, indeed, the principal cause of forced displacement in Colombia over the years. The violence was of such gravity in the communities of Jiguamiandó and Curbaradó that the Inter-American Court of Human Rights, at the request of the Inter-American Commission, ordered the Colombian government to adopt provisional measures to protect the lives and safety of the residents of these communities. The Inter-American Court’s order of March 2003 states pertinently:

the situation endured by the communities comprising the Community Council of the Jiguamiandó and the families of the Curbaradó, as described by the Commission, has obliged their members to displace themselves to jungle zones or other regions; therefore, the State must ensure that the persons benefiting from these measures may continue living in their habitual residence and provide the necessary conditions for the displaced persons from these communities to return to their homes.<sup>63</sup>

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<sup>60</sup> Ibid. at 53.

<sup>61</sup> Andrea Lari, *Striving for Better Days: Improving the Lives of Internally Displaced Persons in Colombia*, supra note 53, at 15.

<sup>62</sup> U.N.G.A., Report of the Representative of the Secretary-General on the human rights of internally displaced persons, supra note 38, at par. 70.

<sup>63</sup> *Case of the Communities of Jiguamiandó and Curbaradó regarding Colombia*, Provisional Measures. Inter-Am. Ct. H.R. Order of March 6, 2003, par. 10. (footnotes omitted)

Despite the binding nature of the Court's order, the situation of insecurity of these communities has continued as a result of the government's failure to put in place the requisite security measures. Consequently, the Inter-American Court, again, in November 17, 2004, March 15, 2005, February 7, 2006 and, most recently, in February 5, 2008, reiterated to Colombia the need to adopt provisional measures to protect the life and personal integrity of the inhabitants of these very vulnerable communities.

## Conclusion

Colombia's legislation dealing with IDPs is perhaps the most advanced in the hemisphere and is generally consistent with the Guiding Principles on Internal Displacement. However, the government's implementation of measures designed to prevent displacement and to meet the urgent protection needs of its displaced citizens to date have been woefully inadequate. Professor Kalin pointedly stated in this regard:

... the dynamics of the conflicts in Colombia and the scale of displacement show that these mechanisms [legislation and policies] in and of themselves are not sufficient to address the problem of the IDPs. The rate of internal displacement has been declining in recent years. However with the accumulation, the number of internally displaced continues to rise. The Government faces an increasing dual challenge of continued new needs, and a growing amount of people who will need sustainable solutions, once they can be envisaged.<sup>64</sup>

It is difficult to envision how Colombia can create conditions for a genuine and lasting peace and national reconciliation while millions of its citizens remain displaced without adequate protection or assistance. It is not too late for the government to redeem its pledge to the international community to take decisive action to resolve the plight of these particularly vulnerable victims of the armed conflict. While this unquestionably will require a greater allocation of financial and human resources, what is most required and has been notoriously lacking over the years is political will on

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64 U.N.G.A., Report of the Representative of the Secretary-General on the human rights of internally displaced persons, *supra* note 38, at par. 71.

the part of the government. The world will be looking with great interest to see how the Colombian authorities respond to this urgent challenge.

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